In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

THE UNITED STATES, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR REHEARING

The Solicitor General, on behalf of the United States, requests that this Court reconsider its order of October 17, 1955, denying the petition for a writ of certiorari, and that further consideration of this case be deferred pending the decision of a case now before the Court of Appeals for the Second Circuit involving the identical issue here presented.

As the principal reason for granting the petition in the instant case, we stated (Pet. 4-7) that the decision below was in conflict with the decision of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176

F. 2d 868, affirming, *per curiam, United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944, certiorari denied, 339 U.S. 904. The taxpayer in its brief in opposition (pp. 10-12) denied the existence of a conflict, contending that the present case was a tax refund proceeding whereas the District of Columbia case was a mandamus action. The denial of the petition, despite the substantial sums involved in the numerous cases pending on this issue (Pet. 7-8), suggests that the Court may have agreed with the taxpayer that no direct conflict was presented.

The most recent decision involving the War Production Board's authority to certify only part of the cost of a new facility is that of the Tax Court in *National Lead Co.* v. *Commissioner,* 23 T.C. 988, where that court agreed with the interpretation of the Court of Claims herein and with Judge Miller's dissent in the *Graphite* case. Judge Opper dissented, relying on the majority decision in the *Graphite* case and the dissent of Chief Judge Jones of the Court of Claims in the instant case.

On September 14, 1955, the Commissioner filed a petition for review of the *National Lead* decision in the Court of Appeals for the Second Circuit, and the case is now pending there. Since both parties are anxious to obtain an early decision, the case will be expeditiously handled, and it is likely that there will be a decision by early next year. As pointed out in our petition, the District Court for the District of Columbia as well as a majority of the Court of Appeals for the District of Colum-

bia have adopted the interpretation for which we contend, and every decision on the question has been a divided one. These factors, we respectfully submit, make it more than a mere possibility that the Second Circuit may reverse the Tax Court, thus creating a square conflict with the decision below. In that eventuality, vacation of the order denying certiorari and issuance of the writ would be warranted (*Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241; *Sanitary Refrig'r Co.* v. *Winters*, 280 U.S. 30, 34, fn. 1).

In filing this petition the Government is fully mindful of the considerations which ordinarily militate against rehearing. If this were an ordinary case, the Government would, of course, accept the finality of decision implicit in the denial of certiorari, and would not press for further consideration of the matter. However, we believe that the circumstances here presented are exceptional. As noted in the petition (pp. 7-8), there is a large number of pending cases involving this issue, and the total claims may run to more than 60 million dollars. Despite the denial of certiorari, these claims will continue to be asserted and contested. If a direct conflict of decisions should develop within the near future, prior to the expiration of the current term, the Court could definitely settle the question and thus avoid needless and protracted litigation in the lower courts. We submit that the interests of expeditious determination of the issue as well as protection of the revenue require that the instant case—particularly in view of the very

large tax refund involved—be kept open, to await the outcome of the pending *National Lead* case in the Second Circuit.[1]

Respectfully submitted,

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NOVEMBER, 1955.

CERTIFICATE OF COUNSEL

As required by Rule 58, I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in that rule.

SIMON E. SOBELOFF,
Solicitor General.

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[1] Cf. *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 233, in which certiorari was granted "because of a conflict between the decision below [of the Court of Claims] and *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 518, decided by the Court of Appeals for the Second Circuit." The *Olympic* petition for certiorari was filed on May 29, 1953; the *Lewyt* case was decided by the Second Circuit on July 14, 1954; and certiorari was granted in *Olympic* on October 14, 1954 (348 U.S. 808).

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MEMORANDUM IN OPPOSITION TO PETITIONER'S REQUEST FOR DEFERMENT OF ACTION ON ITS PETITION FOR REHEARING

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The petition of the United States for a writ of certiorari in this proceeding was denied on October 17, 1955. On November 10, the Solicitor General filed a document which he has entitled "Petition for Rehearing."

Respondent is mindful of the rule which provides that "no reply to a petition for rehearing will be received unless requested by the court." (Rule 58-3) Although the document filed purports to petition this Court for a rehearing, it is principally devoted to a

request for indefinite deferment of any action thereon. It is respondent's understanding that it is proper under the Court's rules to file a reply to such a request and this Memorandum is directed to answering petitioner's alleged reasons for deferment.

In the Solicitor General's own words, what the petitioner is asking is "that further consideration of this case be deferred" (p. 1) and that the case "be kept open, to await the outcome of the pending *National Lead* case in the Second Circuit," (p. 4) which he predicts is "likely" to be decided "by early next year" (p. 2). In substance it is a bold request that final disposition of the instant case be delayed while the Government attempts to develop a conflict where none now exists. As such, it is a violation of Rule 58 and is a contradiction of the Certificate of Counsel which states that the "petition for rehearing is presented in good faith and not for delay."

Petitioner's request for deferment is based on an improper foundation and it fails to state any valid reasons for deferment.

Petitioner's request for deferment is based solely on the assumption that this Court denied the writ because it had accepted respondent's contention that no conflict existed between the Court of Claims and the Court of Appeals for the District of Columbia Circuit. Respondent had assigned four reasons for the denial of the writ, three of which were the contra of the reasons which had been assigned by the petitioner for the granting of the writ. This Court has said that "A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court." *Alexander Agoston* v. *Commonwealth of Pennsylvania,*

340 U.S. 844. See also *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912. This Court has also repeatedly said that no favorable or unfavorable inferences are to be drawn from the denial of a writ. These and other similar statements of the Court should preclude all guesses and assumptions as to why this Court has denied a writ. It is, therefore, improper for petitioner to ground a request for deferment on the assumption stated.

Inherent in the Government's request is the further erroneous assumption that if it can obtain a conflict this Court will grant a writ of certiorari as a routine matter. That is not in accord with either the rules or the practice of this Court. Rule 19; see *Commissioner* v. *Estate of Dix*, Oct. Term 1955, No. 363, cert. den. November 14, 1955; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-468. Petitioner's improper assumption as to why this Court denied the writ relegates to impotency the fact that this Court undertakes discretionary review only where "there are special and important reasons therefor" (Rule 19). Mr. Justice Frankfurter, speaking for the majority of this Court in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 75 S. Ct. 614 (Oct. Term 1954, No. 28, announced May 9, 1955), said:

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Perhaps the Government in its zeal to create a conflict of decisions has forgotten that the statute here involved expired in 1945 and that similar legislation currently in force eliminates the question at issue. In these circumstances to grant the delay requested would elevate a possible conflict of decisions on an "episodic"

problem far above the more vital reason that certiorari is to be granted where it is necessary to settle an important current question of federal statutory law. The issue is now of as little special importance as it was when the Court denied certiorari on October 17. Only when and if petitioner's hoped-for conflict develops "early next year" will the time be ripe for determining whether such a conflict can convert an otherwise unimportant issue into one of sufficient stature to satisfy the "special and important reasons" required by the rule of this Court.

Petitioner states as his first reason for the deferment that "Since both parties are anxious to obtain an early decision, the [*National Lead*] case will be expeditiously handled, and it is likely that there will be a decision by early next year." The *National Lead* decision, which is in concurrence with the Court of Claims decision in the *Ohio* case, was promulgated by the Tax Court on March 14, 1955, which is only thirteen days after the Court of Claims handed down its decision in the *Ohio* case. While respondent does not know when and how the parties became anxious to obtain an early decision and decided to handle the case expeditiously, if the statement of the petitioner is accepted as correct there is no ground for deferment, because proper action can be taken when and if the petitioner secures its hoped for conflict "early next year."

Petitioner's second reason for deferment is to be found on page 3 where it is stated that "every decision on the question has been a divided one," and that this fact makes "it more than a mere possibility that the Second Circuit may reverse the Tax Court, thus creating a square conflict with the decision below." This hopeful reason for deferment is not justified. Two

Courts have considered this amortization issue on its merits, the Court of Claims, composed of five Judges, and the Tax Court, composed of sixteen Judges. One Judge from the Court of Claims and one Judge from the Tax Court dissented. Neither Judge wrote a comprehensive opinion in support of his view, and instead merely adopted the opinion of the District Court in the mandamus proceeding, which we submit is superficial and glosses over both the statutory language and the intent of Congress.

Petitioner implies that its request for deferment is in accord with what the Court did in *Olympic Radio and Television Co.* v. *United States,* 349 U.S. 232. But the situation in the *Olympic* case was entirely different. At the time the petition for a writ of certiorari was filed by the Government in the *Olympic* case there was a direct conflict on the issue between the decision below and the opinion of the Tax Court in the case of *Lewyt Corp.* v. *Commissioner,* 18 T.C. 1245. The Government so advised this Court in its petition for a writ.

In contrast to the *Olympic-Lewyt* situation, the Tax Court in its *National Lead* decision has agreed with the Court of Claims in the instant case. Thus, there is not even an incipient conflict.

When the petition for certiorari was filed, petitioner neglected to direct this Court's attention to the *National Lead* case. This omission was supplied by respondent's brief in opposition because it not only stated that, of the sixteen Judges of the Tax Court, fifteen, with only one dissenting, had promulgated a decision in accord with the Court of Claims decision in the *Ohio Power* case, but also included a copy of the opinion of the Tax Court in the Appendix. We submit that under these circumstances petitioner has no valid basis

for requesting a deferment on account of the *National Lead* case.

Respondent submits that petitioner's only purpose in attempting to obtain deferment of consideration of its so-called petition for rehearing is to take advantage of the deferment in presenting the *National Lead* appeal to the Second Circuit. If this Court agrees to the deferment, the Government will have maneuvered itself into a position where it can press upon the Second Circuit the fact that this Court is holding open the Government's petition for certiorari in this case in order to see whether a conflict of decisions develops. Certainly there can be no other purpose for such a request, because if a conflict should develop in the Second Circuit, then an appropriate opportunity arises to request this Court to consider whether the issue merits review solely because a conflict has developed.

It is respectfully submitted that petitioner's request for deferment should be rejected and that the petition for rehearing should be acted upon forthwith in order to avoid any improper inferences which might be drawn from a deferment in the circumstances.

Respectfully submitted,

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